In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 369

PASQUALE PAGANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-9) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1955 (Pet. App. 10). An order by Mr. Justice Harlan on August 3, 1955, extended the time for filing a petition for a writ of certiorari to and including September 2, and the petition was filed on September 1, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was proper to permit a co-conspirator to testify as a prosecution witness that he had pleaded guilty to the conspiracy charge, where the court instructed that this plea could not be considered as proof of the petitioner's guilt.

2. Whether, after character witnesses had testified at length on direct examination that petitioner's reputation for truthfulness was good up to the time of trial, the prosecution was properly allowed to cross-examine them as to petitioner's arrest on a narcotic violation charge about one week subsequent to the crime for which he was on trial.

STATUTES INVOLVED

18 U.S.C. 201 provides:

> Whoever promises, offers, or gives any money or thing of value * * * to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency * * * with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any

act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

18 U.S.C. 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

STATEMENT

Count IV of an indictment returned in the United States District Court for the Southern District of New York charged petitioner, one Mauro, and others with a conspiracy under 18 U.S.C. 371 to offer a bribe to and to bribe an Internal Revenue official (R. I, 4).[1] Count II charged petitioner with offering a bribe, and Count III charged petitioner and Mauro with paying a bribe, in violation of 18 U.S.C. 201 (R. I, 3-4). Mauro pleaded guilty to Counts I, III, and IV and later Counts I and III were dismissed as to him (R. I, 2, 16). Petitioner was tried alone, found guilty by the jury, and sentenced to imprisonment for five years under Count

[1] The record is in two volumes, which will be referred to as "R. I" and "R. II".

IV, to run consecutively with concurrent terms for three years under each of Counts II and III (R. I, 325, 331). On appeal the judgment was unanimously affirmed (Pet. App. 10).

The evidence adduced at the trial may be summarized in pertinent part as follows:

Internal Revenue agent McSweeney, who died prior to the trial, had been assigned in May 1954 to an investigation of petitioner's alleged income tax liability (R. I, 13, 14). A letter dated May 25, 1954 (Gov. Ex. 3) from McSweeney to petitioner requested the latter to appear at the Internal Revenue office regarding this investigation (R. II, 20; R. I, 135-136). Petitioner went to this office on June 1, 1954, and gave a sworn statement, answering questions propounded by agent McSweeney (Gov. Ex. 1, R. II, 13-19). Petitioner stated that he spent about $3,000 on a trip to Europe in 1951 with his wife and son, but when asked if he had taken any other trips, he "got up and walked out of the room," and the "conference was discontinued" (R. II, 18-19).

A day or two later, according to petitioner's testimony, he mentioned his "problem" to his uncle John Pagano, and a man named Puppy. Puppy said that he knew Mauro, who worked for Internal Revenue and might be able to help petitioner. (R. I, 160-161.)

Mauro testified that a few weeks before June 23, 1954, Puppy introduced him to petitioner on the corner of Third Avenue and 116th Street in the presence of John Pagano, gave him the tax letter

and asked him to call McSweeney about the matter. Mauro promised he would do so (R.I, 17-18, 20-21). After Mauro's first meeting with McSweeney, the latter stated, "You know, it is worth $5,000." When Mauro conveyed this information, petitioner stated that this was ridiculous, and that Mauro should tell McSweeney to forget about it. (R. I, 32-33.) Later, Mauro, on the same street corner in the presence of Puppy, informed petitioner that McSweeney wanted to see him at the Internal Revenue office, and petitioner stated he would go there (R. I, 23, 25). Mauro phoned McSweeney to say that petitioner had promised to come to see him (R. I, 26).

On the afternoon of June 22, 1954, two Treasury Department inspectors stationed themselves with a listening device and tape recorder in a room adjoining that in which agent McSweeney and petitioner were having a conference (R. I, 43-44, 53). They overheard petitioner telling McSweeney that he "had $500 for him [McSweeney] to fix the case, $300 of which would be delivered by Mauro the following day, June 23rd, and $200 * * * within two weeks" (R. I, 45, 54). On the night of June 22, at the same street corner and in the presence of John Pagano, Puppy told Mauro, "Here, this is an envelope with $300 in it; bring it down to Mr. McSweeney. $200 more will follow" (R. I, 27-30, 34, 38-39). On June 23, the day Mauro was arrested, he delivered the $300 in the envelope to McSweeney, who had asked, "Do you have that money for me?"

McSweeney then counted the money in Mauro's presence (R. I, 26-27, 30-31, 39).

On cross-examination by defense counsel, Mauro testified that at no time did petitioner give him money to be passed to McSweeney, or authorize him to give any money to McSweeney (R. I, 32, 36). Mauro's testimony was that petitioner merely said, "Ask Mr. McSweeney if he could help me in any way" (R. I, 36).

Petitioner testified, denying categorically that he ever had the conversation with McSweeney to the effect that he would send Mauro with a $300 payment, with $200 to follow later (R. I, 173, 212). He testified that he sent Mauro merely to learn the nature of the difficulty regarding his income tax forms (R. I, 159), and that McSweeney threatened him (petitioner) with a jail sentence unless he would "straighten out" his tax problem (R. I, 141-143, 119-120).

Five witnesses testified as to petitioner's good reputation for honesty and truthfulness. The first character witness, Barba, testified on direct examination that he had "never heard anything bad about [petitioner]." On cross-examination, this witness was asked, over petitioner's objection, whether he had heard that on June 30, 1954, petitioner was arrested for a conspiracy to violate the narcotic laws, and answered that he had not heard this. (R. I, 73-74.) Thereafter petitioner's counsel on direct examination, in addition to asking the question about whether the witnesses had ever heard anything bad about petitioner, inquired

whether arrests of the petitioner accusing him of other crimes would change their opinions as to his reputation and character. The answers were in the negative. (R. I, 77, 84, 94, 101, 102.) Then on cross-examination the prosecutor, over objection, asked about petitioner's arrest for the 1954 narcotic law charge. Two witnesses testified they had not heard of this (R. I, 78-79, 95-96); one that he had heard a rumor to this effect (R. I, 90-91); and another, that this was "general knowledge in the community" (R. I, 114).

ARGUMENT

1. On the direct examination of Mauro as a government witness, he testified over petitioner's general objection that he had already pleaded guilty to the conspiracy charge in the indictment (R. I, 16). Petitioner contends that introduction of this evidence was error, since this testimony made it improbable that the jury would credit his virtual denial that a conspiracy existed.[2] In effect, he

[2] Even though, as the court below observed (Pet. App. 4), Mauro did "tone down" some of his testimony on cross-examination, his testimony clearly was not tantamount to a denial that a conspiracy ever existed. Mauro admitted his various meetings with the co-conspirators on the street corner; that he knew there was $300 in the envelope received from Puppy; and that he did deliver the $300 to McSweeney saying, "Here's the $300 from that Pat Pagano case thing, from the letter, in regards to the letter" (R. I, 17, 25, 27-29, 38-39). Although he did deny that petitioner gave him money or authorized him to pass money to McSweeney (R. I, 32, 36), this was not inconsistent with his direct testimony that Puppy gave him the $300 in the presence of John Pagano (R. I, 27-30, 34, 38-39). The jury had the right to infer that Puppy was not acting without the knowledge of petitioner.

argues that the jury must have improperly considered that Mauro's plea of guilty tended also to prove petitioner's guilt (Pet. 5, 7-8).

It is common practice for prosecuting attorneys, in using testimony of accomplice witnesses, to bring before the jury the fact of a prior plea of guilty by such accomplice, rather than have the matter developed on cross-examination with possible, unfavorable innuendoes. The courts have held, in cases relied upon by petitioner, that where this is done, a defendant is entitled upon request to an instruction that the plea by the witness should not be considered as evidence of the guilt of the defendant on trial. *Babb* v. *United States,* 218 F. 2d 538, 541-542 (C.A. 5); *United States* v. *Hall,* 178 F. 2d 853 (C.A. 2).[3] But, where, as in this case, the jury has been properly instructed,[4] the fact that the witness is allowed to testify as to his prior plea has been held not to constitute error. *United States* v. *Falcone,* 109 F. 2d 579, 582 (C.A. 2), affirmed, 311 U.S. 205; *Kelling* v. *United States,* 121 F. 2d 428 (C.A. 8); *United States* v. *Hartenfeld,*

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[3] In *United States* v. *Toner,* 173 F. 2d 140, 142 (C.A. 3), the court erroneously charged that the jury could "take into consideration that one of two co-conspirators did plead guilty and make such use of it as they see fit", thereby dissipating the preceding part of the charge.

[4] The court in its final charge said (R. I, 318):

"Now I will add one thing while I am thinking about Mauro. The fact that a person has pleaded guilty to one of the charges in this indictment is in no sense proof of the guilt or innocence of the other person. Of course, a plea of guilty by one man does not prove that somebody else is guilty, and you are not to take that into account in any way in your deliberations."

113 F. 2d 359, 362 (C.A. 7), certiorari denied, 311 U.S. 647; *Grunberg* v. *United States,* 145 Fed. 81, 86 (C.A. 1). See also *Richards* v. *United States,* 193 F. 2d 554, 556 (C.A. 10), certiorari denied *sub nom. Krupnick* v. *United States,* 343 U.S. 930, where similar testimony was held not to constitute error although no instruction was requested or given.

Moreover, defense counsel on cross-examination, in order to impeach Mauro's credibility, made an unsuccessful attempt to extract an admission that Mauro had been promised leniency or special consideration for becoming a government witness (R. I, 35). Then in his final argument to the jury, counsel after alluding to Mauro's guilty plea to the conspiracy count and dismissal by the Government of the substantive counts against him, expressly stated, "We want you to know it happened that way" (R. I, 249). Later in the summation, counsel remarked that the jury could reasonably assume that Mauro as a former government employee was told that, if he would be a government witness, he would obtain favorable consideration for making a statement as to his guilt (R. I, 251-252); and that Mauro "got some special consideration when the counts were dismissed against him," and had reason "to lie as far as the Government's case is concerned" (R. I, 254). The above facts in context evince deliberate initiative by defense counsel to emphasize Mauro's guilty plea as affecting his credibility. In view of the use of the information made by petitioner, he cannot properly com-

plain of its introduction in evidence. *United States* v. *Rollnick,* 91 F. 2d 911, 917 (C.A. 2).

In this setting it was entirely proper for the prosecutor later to ask the jury in his closing argument, "in considering and evaluating the effect of [Mauro's] testimony to keep in mind that he had pleaded guilty to this conspiracy charge" (R. I, 281). The court, moreover, in its final charge gave an unchallenged and correct instruction to the effect that the jury could take into account the fact that Mauro as an accomplice might be hoping for leniency as a result of his testimony (R. I, 317).

2. There is no merit to petitioner's contention (Pet. 10-11) that the trial court erred in permitting cross-examination of petitioner's character witnesses as to whether they had heard that on June 30, 1954—about one week subsequent to the bribe in the instant case—the petitioner had been arrested for a conspiracy to violate the narcotic laws (see Statement, *supra,* pp. 6-7, for the facts regarding this matter).

It should be noted that, in the direct examination of each character witness, he testified that he had "never" heard anything bad about petitioner (R. I, 73, 77, 84, 94, 102). The entire scope of the direct examination of these witnesses shows that it related to petitioner's reputation for honesty and truthfulness up to the time of the trial—a fact which petitioner concedes (Pet. 10). Petitioner's counsel, moreover, in his closing argument, after referring to the propriety of the character witness testimony, stated, "We didn't try to conceal any-

thing here. The whole thing was thrown open to you" (R. I, 267). Petitioner's afterthought, urged here for the first time with no supporting authorities, to the effect that the prosecution, by failing to object to the direct examination testimony as to petitioner's reputation during the post crime period,[5] forfeited the right of cross-examination in regard to this (Pet. 10-11), is without substance.

The prosecutor's cross-examination regarding the narcotic law arrest was proper within the rationale of *Michelson* v. *United States,* 335 U.S. 469, 472, which requires (1) that the questions be founded on fact, and (2) that the jury be advised of the limited purpose of the inquiry. This questioning was concededly grounded upon actual fact, since petitioner admitted the arrest for conspiracy to violate the narcotic laws (R. I, 175). The court's charge, to which no objection was made, complied with the other requirement as to advising the jury of the limited purpose of the inquiry (R. I, 318):

> In the cross examination of the character witnesses and in the cross examination of the defendant himself there were references to an arrest and an indictment for a crime other than

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[5] Even though the narcotic charge arrest occurred on June 30, 1954, or several days after the bribe, the narcotic violation occurred in LeHarve, France, in 1951—about three years prior to the crime in the instant case. Petitioner, moreover, was permitted to deny that he had been in LeHarve at that time, and his counsel commented upon this denial in his closing argument (R. I, 175, 232, 272).

> that here on trial. Now, when character witnesses testify, they testify to the reputation of the defendant, and it is proper to cross examine them as to whether they know about arrests or indictments to see what they know about the defendant's reputation, and to see what they take into account when they evaluate a man's reputation, and that is why that cross examination was permitted.
>
> The fact that a defendant has been arrested or indicted for other crimes is in itself no proof whatever of his guilt in this case, and it is not to be considered as such. It goes to how much weight you want to give to the testimony of the character witnesses.

As this Court stated in *Michelson* (335 U.S. at 479), "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." Since petitioner's character witnesses had broadly portrayed his good reputation for honesty and truthfulness up to the time of trial, basic fairness dictated that the prosecutor should be permitted to cross-examine them as to petitioner's arrest and indictment on the narcotic charge.[6]

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[6] In *Minkow* v. *United States*, 5 F. 2d 319, 320 (C.A. 4) (see Pet. 8), neither of the accused took the stand, and the court left open the question as to what its ruling would have been if they had testified. This is distinguishable from the instant case, where the accused did take the stand.

CONCLUSION

The decision below is correct, and there is no conflict of decisions in the Courts of Appeals. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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